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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

FLETCHER TRUST COMPANY, TRUSTEES AND
TRANSFEREES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

No. 97

**PETITIONER'S BRIEF IN REPLY TO BRIEF FOR
THE RESPONDENT IN OPPOSITION**

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I

Respondent's brief supports the existence of tax liability in this case on purely technical grounds. It makes no argument whatever on the equity of the tax imposition and contains nothing to refute our contentions as to the unfairness and discrimination resulting from enforcing tax liability in this case. We take it therefore as conceded by respondent that the imposition of gift tax here is inequitable and discriminates against petitioner and against the donor

whose gift is involved. To remedy that inequity and discrimination this Court should review the case and reverse the Circuit Court of Appeals and the Tax Court.

II

On the question of the right to collect the donor's gift tax from petitioner as the Trustee of a transferee, respondent's brief refers mainly to the opinions of the Circuit Court of Appeals and the Tax Court as answering petitioner's contentions. In that connection respondent raises two points which call for reply. On page 7 of respondent's brief it is said: "The tax is made a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made * * *," from which statement it may be inferred that the instant case involves the simple matter of the enforcement of a statutory lien. However, the specific statutory provisions in that respect are not to be ignored. Section 517(a)* requires the tax to be assessed within three years after the donor's return was filed and permits no proceeding in court without assessment unless begun within such three-year period.

To enforce the statutory lien created by Section 510 it is first necessary that a valid assessment be made. As shown under point 4, at pages 19-20, of petitioner's brief, there can be no valid assessment of the statutory liability of a donee for gift tax unless such assessment is made within the three-year period provided by Section 517(a). In this case the three-year period had expired before respondent issued a deficiency notice. Furthermore, as shown under point 3, at pages 18-19 of petitioner's brief,

* The statutory references in this reply brief are to the Revenue Act of 1932 unless otherwise indicated.

Section 513(a) prohibits any assessment, distraint or collection proceeding without the prior giving of a deficiency notice to the donor. Such notice to the donor was not given in this case. Therefore, the statutory requirements prerequisite to the enforcement of a lien have not been and cannot be complied with, and the statutory lien cannot be enforced in this case.

The statutory lien provision has even confused the Circuit Court of Appeals for the Third Circuit in its decision in *Fidelity Trust Co. v. Commissioner*, 141 F. 2d 54, a decision in which that Court refused to follow the reasoning and grounds upon which the case at bar was decided by the Circuit Court of Appeals for the Seventh Circuit and by the Tax Court and advanced as its basis for holding the trustee of a gift in trust liable as trustee for a transferee under Sections 526 and 527, the theory that the statutory lien provision had the effect of creating a liability at law or in equity against the "trust estate", enforceable against the "trust estate" as a transferee under Section 526. But the possible existence of a lien if certain statutory steps are taken to perfect such lien does not create a liability at law or in equity against any transferee, and we know of no other case under any of the federal tax laws so holding. Furthermore, there is no basis for treating the "trust estate" as a separate legal entity, as persons, fiduciaries and corporations are treated under the gift tax law. Under the income tax law estates and trusts are by express statutory provisions placed in the category of taxpayer entities, but that is not true under the gift tax.

Therefore, the statutory lien provision has no bearing on the questions presented in this case. That provision

has served only to lead the Circuit Court of Appeals for the Third Circuit into a conflict with the decision in the case at bar of the Circuit Court of Appeals for the Seventh Circuit as to the legal theory on which the trustee of a gift in trust may be held liable for the donor's gift tax.

III

At pages 9-10 of respondent's brief it is stated that if petitioner's contentions should be upheld the Commissioner would be wholly prevented from resorting to transferee proceedings to collect gift tax from a trustee, thereby disrupting the collection procedure and rendering the statute ineffective in a large area to which it should apply. With that statement we take issue. The Commissioner need only give a timely notice of deficiency determination to the donor, as required by Section 513(a), and make a timely assessment within the three-year limitation period prescribed by Section 517(a), and the Commissioner is then freed of all statutory restriction in proceeding against transferees and in enforcing the lien against the property given by the donor.

IV

In addition to the numerous cases cited at page 33 of petitioner's brief, showing the importance of the questions here presented, are the more recent decisions of the Tax Court in *Eileen K. Vogel*, Memo. Dec. No. 13854(M) and *Fidelity-Philadelphia Trust Company*, Dec. No. 13884, 3 T. C. The opinion of the Tax Court in the *Fidelity-Philadelphia Trust Company* case emphasizes another aspect of the argument made under point 2 at pages 16-17 of petitioner's brief, viz., that the donee-beneficiaries in expectancy of a spendthrift gift in trust do not incur liability

for gift tax under Section 510. That case brings out the failure of the Commissioner in this case to sustain the burden of proof of the transferee liability upheld against petitioner.

Petitioner's liability under Section 527, if any exists, is derivative, i.e., petitioner's duty as trustee is to assume the liability of the donee-beneficiaries. Under Section 510 the liability of each donee-beneficiary is limited to the value of the gift to him. It is obvious that there can be no fair market value, or realizable value in any amount, in a gift of a contingent interest in expectancy in a spendthrift trust, and respondent introduced no evidence in this case to prove the existence of any such value. Respondent has therefore wholly failed to meet the burden of proof of transferee liability placed on respondent by Section 1119(a) of the Internal Revenue Code.

CONCLUSION

We say again that the questions presented in this case are of such general interest and great importance that review by this court is warranted; that the questions have been erroneously decided by the courts below and correction by this Court is needed; and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Trustees and Transferees,
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